Charles D. Powell was convicted of murder in the second degree, and he brings error. Reversed, and new trial granted.

J. L. Broudy, of Norfolk, and *Jno. W. Happer,* of Portsmouth, for the plaintiff in error.

John R. Saunders, Atty. Gen., for the Commonwealth.

ATLANTIC COAST LINE R. CO. *v.* A. M. WALKUP CO., Inc., et al.

June 15, 1922.

[112 S. E. 663.]

1. Railroads (§ 17*)—Supervising Engineer's Acts Held Binding on Companies Erecting Union Station.—Where two railroads let a contract for the construction of a union station, the work to be done under the superintendence of an engineer of one of the railroads, and each company to pay half of the cost, the action of the engineer in stopping work upon the station because of a desire to change the location and in thereafter awarding to the contractor an additional sum for the increased cost of the work due to the delay was the act of an agent of both railroad companies, so that each must pay its share of the extra compensation.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 249.]

2. Contracts (§ 301*)—Contractor May Recover for Loss from Unreasonable Delay Caused by Owner.—A building contractor may recover damages sustained by him for loss resulting from unreasonable delay on the part of the owner in permitting him to perform his contract.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 437.]

3. Railroads (§ 17*)—Contract for Erection of Union Station Held Not within Agent's Authority.—Knowledge by a contractor for a union railroad station, to be paid for jointly by two railroads, that the removal of the station to another site was a new contract, placed upon him the duty to ascertain the authority of the agent who authorized the removal to bind the company by which he was not employed, so that the contractor cannot recover from the latter company any portion of the cost of removal which it had expressly refused to pay for.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 250.]

4. Judgement (§ 208*)—Joint Party against Whom Judgment Was Not Rendered Held Not Entitled to Be Dismissed.—Where a contractor, who undertook the construction of a union depot to be paid for by two railroad companies, brought suit against both companies, and verdict was rendered in favor of the defendant company, whose agent had been in charge of the work, which might be liable for the

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

amount recovered from the other company, the defendant securing the successful verdict was not entitled to have the action dismissed as to it, as it would have been if the action had been in tort, so that there could be no contribution.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 707.]

5. Appeal and Error (§ 1175 (1)*)—Evidence Held to Authorize New Judgment Disposing of the Case.—Where the judgment below authorized recovery by a contractor for the removal of a union railroad station from a railroad company which had refused to pay any portion of such cost except a sum which it had previously paid to the other company using the station, and both companies were before the court on writ of error, and there was no probability that on another trial different evidence might be introduced, the court can dispose of the case under Code 1919, § 6365, by reversing the judgment for the improper amount against the company, which did not authorize the expenditure and rendering judgment for that amount against the other company.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 628.]

6. Railroads (§ 17*)—Liable for Fraud of Engineer Acting within Scope of Authority.—A misstatement, made by the engineer in charge of construction of a union depot, that the two railroads who were to use the depot were to pay jointly for the additional expense incurred by moving the site for the benefit of one of the companies, is a constructive fraud on the contractor, who relied on that misrepresentation in proceeding with the work, for which the railroad company, whose general agent the engineer was, is liable for that representation, which was made within the scope of his authority and for the corporation's benefit.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 271.]

Error to Hustings Court of Petersburg.

Action by the A. M. Walkup Company, Inc., against the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railway Company. Judgment for the plaintiff against the defendant Atlantic Coast Line Railroad Company, and for the defendant Seaboard Air Line Railway Company, and the Atlantic Coast Line Railroad Company brings error. Motion of the Seaboard Air Line Railway Company to be dismissed as a party to the writ of error denied, and judgment reversed in part and affirmed in part so as to require each defendant to pay a portion of the amount due plaintiff.

Wm. B. McIlwaine and *Bernard Mann*, both of Petersburg, for plaintiff in error.

Munford, Hunton, Williams & Anderson, and *D. C. O'Flaherty*, all of Richmond, for defendant in error.

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.